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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent, **A138586**

v. **(Contra Costa County Super. Ct. No. 05-121418-8)**

MICHAEL ANTHONY MENDIVIL,

Defendant and Appellant.

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Appellant Michael Anthony Medivil pled no contest to vehicle theft (Veh. Code, § 10851, subd. (a)), evading a peace officer (Veh. Code, § 2800.2, subd. (a)), being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1)),[1] and possession of ammunition (§ 30305, subd. (a)). He admitted a prior vehicle theft conviction. The trial court sentenced appellant to a five-year prison term and suspended execution of that sentence. The court placed appellant on probation for five years and ordered him to complete a one-year residential treatment program at the Salvation Army (the program). Appellant left the program without permission and the court revoked his probation.

On appeal, appellant contends the court abused its discretion by revoking probation because his violation was "de minimis." We disagree and affirm.

[1] Unless otherwise noted, all further statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was required to complete the one-year program as a condition of probation. Appellant left the program in October 2012 without authorization and the probation department filed a petition to revoke probation. The facts are taken from the probation violation hearing.

Prosecution Evidence

Salvation Army intake coordinator Michael O'Reilly testified appellant left the program without consent and without having completed the program. Appellant told O'Reilly he "[j]ust didn't want to do it." O'Reilly did not recall appellant crying about problems he was having with other program participants, nor did O'Reilly recall appellant complaining about "problems with gang involvement with people in the program." If appellant had complained about other program participants, O'Reilly "would have found out who they were and they would have been discharged." Appellant's parole officer did not tell O'Reilly about problems appellant apparently had "because of his gang dropout status with individuals in the program[.]"

Defense Evidence

Appellant testified he dropped out of the Norteño gang in 2003. He entered the program in September 2012 and began to have "problems." As appellant explained, "[t]here were some active gang members that were there doing the program . . . and they were kind of pushing up on me a little bit because I am a Northerner dropout." Appellant was afraid for his safety and told O'Reilly and his parole officer about his concerns. Appellant went to O'Reilly's office a "couple times" to tell him he "was having problems." As he explained, "I was having a hard time there. There's a lot of rules and everything; I am not going to lie. [¶] I was having a time in there. But I went in there and I was crying — I literally was in tears crying, and I was telling him that I had problems with these guys because I'm an ex-gang member and they're still in the gang; and he asked me to tell him who they were, and I wouldn't do it."

Appellant left the program in mid October 2013. The next day, appellant talked to his parole agent about attending a different treatment program and understood that he

would enter "DVR" on January 1, 2013.[2] He did not, however, enter the DVR program on January 1, 2013 because he "was stabbed on December 9th" and needed "emergency surgery[.]" Appellant did not tell his probation officer about the problems he was having in the program because he "reported to parole; and [he] didn't know about reporting to probation" and did not know who his probation officer was.

On cross-examination, appellant admitted he did not contact his parole officer in December 2012. He also conceded he never contacted his probation officer, even though he was "pretty sure" he was "supposed to" do so as a condition of probation. Appellant also admitted he was "having a rough time" in the program.

The Court's Findings

At the conclusion of the hearing, the court revoked appellant's probation. It explained, "I listened very carefully to the evidence. I have had Mr. Mendivil in front of me a number of times prior to this hearing. I did listen carefully to Mr. Mendivil; frankly the more [he] spoke, the less credible I found him. I found Mr. O'Reilly credible. [¶] I find Mr. Mendivil is in violation of his probation and I am imposing the five years state prison suspended sentence."

DISCUSSION

"Section 1203.2, subdivision (a), authorizes a court to revoke probation if the interests of justice so require and the court, in its judgment, has reason to believe that the person has violated any of the conditions of his or her probation. [Citation.] '"When the evidence shows that a defendant has not complied with the terms of probation, the order of probation may be revoked at any time during the probationary period. [Citations.]" [Citation.]' The standard of proof in a probation revocation proceeding is proof by a preponderance of the evidence. [Citations.] 'Probation revocation proceedings are not a

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[2] The parole officer's note, admitted into evidence, states: "On 10/17/2012, Mendivil left Salvation Army due to having problems while in the program and subject reported to this AOR. After that point, this AOR had problems contacting and locating [appellant] for weeks at a time. [Appellant] finally stop[ped] contacting this AOR and a warrant was placed. This AOR feels a Drug program/structured residence like DVR or VOA would be good for [appellant]."

part of a criminal prosecution, and the trial court has broad discretion in determining whether the probationer has violated probation.' [Citation.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 772, fn. omitted (*Urke*).)

We review the court's revocation of appellant's probation for abuse of discretion. "'The discretion of the court to revoke probation is analogous to its power to grant the probation, and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action. [Citations.]' [Citation.] 'Many times circumstances not warranting a conviction may fully justify a court in revoking probation granted on a prior offense. [Citation.]' [Citations.] '"[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation. . . ."' [Citation.] And the burden of demonstrating an abuse of the trial court's discretion rests squarely on the defendant. [Citation.]" (*Urke, supra,* 197 Cal.App.4th at p. 773.)

Relying on *People v. Buford* (1974) 42 Cal.App.3d 975 (*Buford*), appellant contends the court abused its discretion by revoking his probation for a "de minimis" violation. In *Buford*, the trial court revoked the defendant's probation because he failed to register as a sex offender. The *Buford* court reversed, concluding there was no evidence the probation officer or the court told the defendant about the registration requirement. (*Id.* at pp. 986-987.) *Buford* does not assist appellant because appellant was aware of the requirement he complete the program. In addition, *Buford* applied a "clear and convincing evidence" standard for revoking probation, which is no longer the standard. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 444, fn. 3 (*Rodriquez*).)

Here, the court did not abuse its discretion by revoking appellant's probation. The evidence demonstrates appellant left the court-ordered program without permission, failed to contact his probation officer, and did not maintain regular contact with his parole officer. The court determined appellant's reasons for leaving the program were not credible and we defer to the court's credibility determination. Appellant was the beneficiary of a lenient plea agreement. He was sentenced to state prison, that sentence was suspended, and he was placed on probation. Central to this generous grant of

leniency was the requirement appellant complete the program, but he willfully left the program without permission. Under the circumstances, the court did not abuse its discretion by revoking appellant's probation and executing the previously imposed state prison sentence. This is not a "'very extreme case'" where the court's decision to revoke probation is an abuse of discretion. (*Rodriguez, supra,* 51 Cal.3d at p. 443, quoting *People v. Lippner* (1933) 219 Cal. 395, 400.)

DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.